

1 The Honorable Edward F. Shea
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

8 SARAH BRADBURN, PEARL
9 CHERRINGTON, CHARLES HEINLEN,
10 and the SECOND AMENDMENT
11 FOUNDATION,
12 Plaintiffs,
13 v.
14 NORTH CENTRAL REGIONAL LIBRARY
15 DISTRICT,
16 Defendant.

NO. CV-06-327-EFS

**PLAINTIFFS' BRIEF REGARDING
IMPACT OF WASHINGTON STATE
SUPREME COURT'S CERTIFIED
QUESTION DECISION ON PENDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

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PLAINTIFFS' BRIEF REGARDING IMPACT OF
WASHINGTON STATE SUPREME COURT'S CERTIFIED
QUESTION DECISION ON PENDING CROSS-MOTIONS
FOR SUMMARY JUDGMENT

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1 **A. INTRODUCTION.**

2 In a rapidly-evolving world, the majority opinion in *Bradburn v. North Central*
 3 *Regional Library District*, No. 82200-0, slip op. (Wash. May 6, 2010), fails to protect speech in
 4 precisely those locations – Internet-accessible computer terminals in public libraries – where
 5 vigorous speech protection is most vitally needed. The *Bradburn* majority misread and
 6 misapplied *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003) (“ALA”), which
 7 expressly left open the question presented here: whether a public library’s use of a particular
 8 filter in a given fact setting is unconstitutional as applied. This Court need not, and should not,
 9 follow the *Bradburn* majority in ruling on Plaintiffs’ First Amendment claims. The *Bradburn*
 10 dissenters predicted that the federal courts would strike down the NCRL’s filtering policy
 11 under the First Amendment. No. 82200-0, slip op. at 7 (Chambers, J. dissenting). That is what
 12 this Court should do.

13 **B. THE *BRADBURN* MAJORITY OPINION IS NOT DISPOSITIVE OF**
 14 **PLAINTIFFS’ CLAIMS UNDER FEDERAL LAW.**

15 A state court’s construction of the United States Constitution is not binding on the
 16 federal courts. *Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989). It follows that the
 17 *Bradburn* majority’s construction of a *state* constitutional provision (Wash. Const. art. I, § 5)
 18 cannot control this Court’s resolution of Plaintiff’s First Amendment claims. Rather, this Court
 19 must “make [an] independent inquiry and determination” regarding those claims. *Aftanase v.*
 20 *Economy Baler Co.*, 343 F.2d 187, 192 (8th Cir. 1965).

21 **C. THE *BRADBURN* MAJORITY WRONGLY FAILED TO PROTECT**
 22 **SPEECH IN A SETTING WHERE THE RIGHTS TO SPEAK AND TO**
 23 **RECEIVE INFORMATION ARE MOST VITALLY IMPORTANT.**

24 **1. Speech in Public Libraries and on the World Wide Web Deserves Robust**
 25 **First Amendment Protection.**

26 One would expect the First Amendment to apply with special force in public libraries.
 27 Libraries are “essential to the functioning of a democratic society.” Franklin D. Roosevelt,
reprinted in LIBRARIES & DEMOCRACY: THE CORNERSTONES OF LIBERTY 3 (Nancy Kranich ed.

1 2001). They are “the great tools of scholarship, the great repositories of culture, and the great
 2 symbols of the freedom of the mind.” *Id.* They are a “mighty resource in the free marketplace
 3 of ideas,” *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976).

4 Librarian and educator Leon Carnovsky wrote:

5 If there is one agency above all which has the power to put teeth into the
 6 principle of free speech, it is the public library. I know of no nobler function
 7 which it has to perform than this: the presenting of all points of view, however
 8 unpopular, even loathsome, some of them may seem; by the same token, I know
 9 of no greater evil, no surer betrayal of that function, than the denial of the
 10 expression of certain viewpoints through a deliberate or contrived censorship.

11 Leon Carnovsky, *The Obligations and Responsibilities of the Librarian Concerning*
 12 *Censorship*, 20 LIBRARY QUARTERLY 21 (1950), *reprinted in LANDMARKS OF LIBRARY*
 13 *LITERATURE 1876-1976* 188, 194 (Dianne J. Ellsworth and Norman D. Stevens eds. 1976).
 14 Consistent with the foregoing views, federal courts have held that “[t]he right to receive
 15 information is vigorously enforced in the context of a public library.” *Sund v. City of Wichita*
 16 *Falls, Texas*, 121 F. Supp.2d 530, 547 (N.D. Tex. 2000).

17 And yet paradoxically, according to the *Bradburn* majority, public libraries are a
 18 singular environment where censorship is allowed and fundamental speech protections do not
 19 apply. Adding to this irony is the fact that the Internet is “the most participatory form of mass
 20 speech yet developed,” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863 (1997)
 21 (citation omitted); and that in other contexts there is “no basis for qualifying the level of First
 22 Amendment scrutiny that should be applied to this medium,” *id.* at 870. In effect, the *Bradburn*
 23 majority has created, at the intersection of two crucial information sources that should (and in
 24 other contexts do) enjoy special protection in free-speech jurisprudence, an unwarranted
 25 exception to basic free-speech rights. This Court should not extend that error into federal law.

26 **2. The *Bradburn* Majority Opinion Threatens to Widen the Digital Divide.**

27 *Bradburn* is especially pernicious because it disproportionately targets the residents of
 28 rural and poor communities. According to a 2008 report, 28% of the residents of five rural
 29

1 Washington counties (including Ferry County, which the NCRL serves) do not have in-home
 2 Internet access, and only 39% have broadband Internet access. Thomas Robinson *et al.*,
 3 *Broadband Study Report Prepared for the Washington Utilities and Transp. Comm'n* 37-38
 4 (2008).¹ A recent report based on the first-ever large-scale study of library computer and
 5 Internet usage showed that nearly one-third of Americans age 14 or older – 77 million people –
 6 had used a public library computer or wireless network to access the Internet in the prior
 7 twelve-month period. Samantha Becker *et al.*, Institute of Museum and Library Services,
 8 *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries*
 9 1-2 (2010).² Libraries, the report noted, “appear to be particularly effective in addressing the
 10 needs of families who still lack [Internet] access elsewhere,” *id.* at 2:

11 Overall, 44 percent of people in households living below the federal poverty
 12 line (\$22,000 a year for a family of four) used public library computers and
 13 Internet access. Among young adults (14-24 years of age) in households below
 14 the federal poverty line, 61 percent used public library computers and Internet
 15 for educational purposes. Among seniors (65 and older) living in poverty, 54
 16 percent used public library computers for health or wellness needs.

17 *Id.* The study confirmed that millions of Americans who use public library computers have no
 18 other means of sending and receiving information online. *Id.*, Appendix Table 8. “But for
 19 libraries,” the report stated, “millions of Americans would not have reliable Internet access in a
 20 digital age when a connection is often needed to complete school assignments, apply for jobs,
 21 or secure government services.” *Id.* at 2.

22 “[T]he notion that privileged citizens who have Internet access without the use of public
 23 facilities can choose whether or not to use filters, while those dependent on government-funded
 24 access have no choice, is inimical to the nature of democracy.” Susan B. Ketchmer, *The*
 25 *Library Internet Access Controversy and Democracy*, in LIBRARIES & DEMOCRACY 96, 103.

26 ¹ Available at <http://www.wutc.wa.gov/webimage.nsf/0/0C107F2AECEC013A8825733800684FCF>.

27 ² Available at http://impact.ischool.washington.edu/documents/OPP4ALL_FinalReport.pdf.

1 The digital revolution is transforming the ways in which we send and receive information.³ As
 2 this trend accelerates, judicial opinions sanctioning the censorship of online speech by public
 3 library administrators will assume increasing significance – particularly for patrons whose only
 4 window on the digital world is a library computer. Under the *Bradburn* majority’s sweeping
 5 opinion, what would prevent a public library district from denying all patrons – including
 6 adults – access to websites falling within the Fortiguard category “Tasteless” (“Websites that
 7 host offensive and crude material such as insulting jokes, negative opinions, pranks, dark
 8 humor, harsh language, etc.,” Docket No. 41-8 at 563)? What would stop a library district from
 9 denying all patrons access to websites about subjects like gambling, abortion, homosexuality,
 10 smoking, drug abuse, New Age religion or firearms, on the theory that such sites are not
 11 suitable for children? What would prevent a library district from “selecting” only certain
 12 “worthwhile” websites of “requisite and appropriate quality,” *Bradburn*, No. 82200-0, slip op.
 13 at 12, 15, while blocking less “worthwhile” sites offering diverse perspectives? In short, what
 14 would prevent public library administrators from restricting online content to include only
 15 materials conforming to their worldview and perception of suitability, in a misguided attempt to
 16 protect readers from the imagined harmful consequences of their reading? This Court should
 17 not follow the *Bradburn* majority, and should not allow unreviewable censorship in a venue
 18 where speech is most in need of abiding protection.

19

20 **D. FEDERAL FIRST AMENDMENT JURISPRUDENCE DOES NOT SUPPORT**
THE *BRADBURN* MAJORITY’S OVERBREADTH OPINION.

21 **1. Print Collection Development Is Selection; Internet Filtering Is Censorship.**

22 Library administrators undoubtedly enjoy broad latitude in shaping their print
 23 collections. The only restriction on print acquisition decisions is that they not be made “in a

24

25 ³ See, e.g., Jennifer C. Hendrix, ALA Office for Information Technology Policy, *Checking Out the Future: Perspectives from the Library Community on Information Technology and 21st-Century Libraries* (Policy Brief No. 2, Feb. 2010), available at http://www.ala.org/ala/aboutala/offices/oitp/publications/policybriefs/ala_checking_out_the.pdf; John D. Sutter, *The future of libraries, with or without books* (2008), available at <http://www.cnn.com/2009/TECH/09/04/future.library.technology/index.html?iref=newssearch>; Jonathan Shaw, *Gutenberg 2.0: Harvard’s Libraries Deal with Disruptive Change*, HARVARD MAGAZINE, May-June 2010, at 36.

1 narrowly partisan or political manner.”” *Bradburn*, No. 82200-0, slip op. at 13 (quoting *Board*
 2 *of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870 (1982)). This is
 3 all we can realistically hope for in the context of print materials, since “[t]here is only so much
 4 money and so much shelf space.” *ALA*, 539 U.S. at 236 (Souter, J., dissenting). “At every
 5 single point, however, … Internet blocking … defies comparison to the process of acquisition”
 6 – most significantly because blocking “is not necessitated by scarcity of either money or space.
 7 In the instance of the Internet, what the library acquires is electronic access, and the choice to
 8 block is a choice to limit access that has already been acquired.” *Id.* at 237. Justice Chambers
 9 similarly observed in his *Bradburn* dissent that “censoring material on the Internet” “is like
 10 refusing to circulate a book that is in the collection based on its content. That would raise
 11 serious constitutional concerns.” No. 82200-0, slip op. at 7-8 (Chambers, J., dissenting).

12 Justice Chambers’ reference to censorship was apt. In selecting print materials to
 13 include in their collections, librarians do their best, given limited resources, to “promot[e] the
 14 freedom to read by making as accessible as possible as many things as [they] can.” Lester
 15 Asheim, *Not Censorship but Selection*, 28 WILSON LIBRARY BULLETIN 63 (1953).⁴ The censor
 16 of websites, by contrast, inhibits reading, disrupts the free flow of ideas, and acts as a bar to
 17 communication that would occur but for the existence of a filter blocking access to protected
 18 speech stored in the vast online repository that is the World Wide Web.

19 The *Bradburn* majority concluded that Internet filtering was indistinguishable from
 20 print collection development. No. 82200-0, slip op. at 15-16. But only four justices in *ALA*
 21 expressed a similar view. 539 U.S. at 208 (plurality opinion). Justice Breyer, writing
 22 separately, stated that although in his opinion the Children’s Internet Protection Act (CIPA, the
 23 statute at issue in *ALA*), was, “in essence, a kind of ‘selection’ restriction,” it should be subject
 24 to heightened scrutiny, *unlike* collection-development decisions. 539 U.S. at 216-18 (Breyer,
 25 J., concurring in the judgment). No other justice addressed the issue. In short, *ALA* does not

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 27 ⁴ Available at <http://www.ala.org/ala/aboutala/offices/oif/basics/notcensorship.cfm>.

1 support the *Bradburn* majority's view that library administrators enjoy the same discretion to
 2 block Internet content as they do in acquiring print volumes.
 3

4 **2. Under Federal Law, the NCRL's Filtering Policy Is Overbroad.**

5 The *Bradburn* majority's overbreadth holding – essentially that the doctrine does not
 6 apply to public-library filtering policies, No. 82200-0, slip op. at 18 – is not supported by *ALA*
 7 or any other pertinent authority. The *ALA* plurality did not mention overbreadth or authorize
 8 libraries to prevent their adult patrons from accessing protected speech. The closest the
 9 plurality came to discussing overbreadth was a paragraph addressing the dissents' criticism of
 10 the tendency of Internet filters to block Web pages containing innocuous content. 539 U.S. at
 11 208-09 (plurality opinion). But instead of arguing that this problem was constitutionally
 12 insignificant, the plurality dismissed it based on “the ease with which patrons may have the
 13 filtering software disabled.” *Id.* at 209. Justices Kennedy and Breyer similarly upheld CIPA
 14 on the assumption that adults would be able to access protected speech. *Id.* at 214-15
 15 (Kennedy, J., concurring in the judgment); *id.* at 219-20 (Breyer, J., concurring in the
 16 judgment). As the *Bradburn* dissenters observed, eight justices in *ALA* “found the ability of a
 17 patron to *disable* the filter constitutionally critical,” while the ninth (Justice Stevens) believed
 18 CIPA was unconstitutional on its face even if adult library patrons could obtain unfiltered
 19 Internet access on request. *Bradburn*, No. 82200-0, slip op. at 5-6 (Chambers, J., dissenting).
 20 No *ALA* justice even hinted, let alone held, that the First Amendment allowed library
 21 administrators to filter a substantial quantity of protected speech for adults. If anything, *ALA*
 22 suggests precisely the opposite – that public libraries run afoul of the First Amendment if they
 23 prevent adults from accessing protected speech online.

24 The NCRL's Internet filter indisputably blocks a substantial quantity of speech –
 25 because of filtering errors (overblocking), because the filter blocks entire websites, and because
 26 the NCRL has deliberately configured the filter to block speech that is constitutionally
 27 protected for adults. Docket No. 40 at 3-4, 11-13; Docket No. 53 at 7-11. It is undisputed that

1 patrons requesting access to erroneously blocked sites have waited days for the NCRL to
 2 review their requests. Docket No. 57 at 7-8, ¶ 13. It is undisputed that the NCRL blocks an
 3 enormous amount of protected speech by filtering websites and not Web pages. Docket No. 40
 4 at 3-4, 13. And it is undisputed that the NCRL's policy of limiting its adult patrons to viewing
 5 only websites that the NCRL's executive staff deem fit children prevents adult patrons from
 6 accessing a substantial quantity of protected speech. *Id.* at 3-4, 9-10; Docket No. 53 at 7-9.⁵

7 The *Bradburn* majority brushed these harms aside, but this Court cannot do so under
 8 federal law. "The overbreadth doctrine prohibits the Government from banning unprotected
 9 speech if a substantial amount of protected speech is prohibited or chilled in the process."
 10 *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 255 (2002).⁶ This Court should follow
 11 established precedent, heed the numerous statements in *ALA* indicating that libraries must
 12 unblock Internet filters at the request of adult library patrons, and strike down as overbroad the
 13 NCRL's policy of refusing to disable its Internet filter at the request of adult library patrons.
 14

15 **E. THE *BRADBURN* MAJORITY WRONGLY SUBJECTED THE NCRL'S
 16 CONTENT-BASED FILTERING POLICY TO RATIONAL-BASIS REVIEW.**

17 *ALA* also does not support the *Bradburn* majority's conclusion that library filtering
 18 policies denying adult patrons access to websites containing protected speech are subject only
 19 to rational-basis scrutiny. No. 82200-0, slip op. at 27. Although the *ALA* plurality concluded
 20 that filtering decisions by library administrators should not be subject to heightened judicial
 21 scrutiny, 539 U.S. at 205 (plurality opinion), *this view was not shared by any other justice*.

22 Justice Breyer was the only other justice who agreed that blocking access to a website

23 ⁵ The *Bradburn* majority misstated the nature of Plaintiffs' overbreadth challenge. Plaintiffs have never contended
 24 that "a policy that applies so broadly that it excludes *any* constitutionally protected speech violates article I,
 25 section 5." No. 82200-0, slip op. at 16 (emphasis added). Rather, Plaintiffs maintain that a filtering policy like the
 26 NCRL's that blocks *a real and substantial quantity* of protected speech is unconstitutionally overbroad.

27 ⁶ See also *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F.Supp.2d 783, 796-97
 28 (E.D. Va. 1998); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F.Supp.2d 552,
 567 (E.D. Va. 1998); Docket No. 40 at 9-13. Contrary to the *Bradburn* majority's suggestion, No. 82200-0, slip
 29 op. at 14-16, *ALA*, which did not involve an overbreadth challenge to an actual library filtering policy, in no way
 30 abrogated or undermined Judge Brinkema's conclusion that the filtering policy at issue in the *Mainstream*
 31 *Loudoun* cases improperly reduced adults to viewing only what was fit for children.

1 was in any way analogous to refusing to acquire a print volume. *Id.* at 216-17 (Breyer, J.,
 2 concurring in the judgment). Importantly, however, Justice Breyer did *not* agree with the
 3 plurality that library filtering decisions should be reviewed for rationality. To the contrary, he
 4 concluded that because Internet filtering “directly restricts the public’s receipt of information,”
 5 filtering provisions require “a form of heightened scrutiny” and must be examined with
 6 “special care.” *Id.* at 216. Courts in such cases should “ask[] whether the harm to speech-
 7 related interests is disproportionate in light of both the justifications and the potential
 8 alternatives.” *Id.* at 217. Courts should “consider[] the legitimacy of the statute’s objective,
 9 the extent to which the statute will tend to achieve that objective, whether there are other, less
 10 restrictive ways of achieving that objective, and ultimately whether the statute works speech-
 11 related harm that, in relation to that objective, is out of proportion.” *Id.* at 217-18 (*citing Board*
 12 *of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)). Justice Breyer
 13 upheld CIPA because of its disabling provision, *id.* at 219; and noted that a library’s refusal to
 14 disable its filter for adults could be actionable under the First Amendment, *id.* at 219-20.

15 Justice Kennedy observed that although “there is little to this case” “[i]f, on the request
 16 of an adult user, a librarian will unblock filtered material or disable the Internet software filter
 17 without significant delay,” an as-applied challenge to CIPA could succeed “[i]f some libraries
 18 do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown
 19 that an adult user’s election to view constitutionally protected Internet material is burdened in
 20 some other substantial way.” *Id.* at 214-15 (Kennedy, J., concurring in the judgment). He did
 21 not discuss what standard of scrutiny should apply to filtering decisions, or indicate how he
 22 would decide a case like this one, involving restrictions on what adult patrons can read online.

23 It is significant that Justice Kennedy did not join the plurality. Over the years he has
 24 authored and joined in numerous opinions which, in similar factual contexts, have been highly
 25 protective of First Amendment rights. For example, in *United States v. Playboy Entertainment*
 26 *Group, Inc.*, 529 U.S. 803 (2000), he wrote the majority opinion striking down a federal statute

1 requiring television operators to scramble sexually-explicit channels or limit such programming
 2 to hours when children were unlikely to be watching. *Id.* at 806-07. “If a statute regulates
 3 speech based on its content,” he wrote, “it must be narrowly tailored to promote a compelling
 4 Government interest. If a less restrictive alternative would serve the Government’s purpose,
 5 the legislature must use that alternative.” *Id.* at 813 (citation omitted). Moreover, “[w]here the
 6 designed benefit of a content-based speech restriction is to shield the sensibilities of listeners,
 7 the general rule is that the right of expression prevails, even where no less restrictive alternative
 8 exists.” *Id.* Driving home the importance of this holding, he wrote:

9 The Constitution exists precisely so that opinions and judgments, including
 10 esthetic and moral judgments about art and literature, can be formed, tested, and
 11 expressed. What the Constitution says is that these judgments are for the
 12 individual to make, not for the Government to decree, even with the mandate or
 13 approval of a majority. *Technology expands the capacity to choose; and it*
denies the potential of this revolution if we assume the Government is best
positioned to make these choices for us.

14 *Id.* at 818 (emphasis added).

15 The *Bradburn* majority adopted a view even less protective of speech than that of the
 16 *ALA* plurality, but this Court may not similarly ignore the concurring and dissenting opinions in
 17 *ALA*. When the United States Supreme Court renders a splintered decision in which no opinion
 18 garners a majority, lower federal courts should adhere to “a legal standard which, when
 19 applied, will necessarily produce results with which a majority of the Court from that case
 20 would agree.” *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (citation and
 21 internal quotation marks omitted). *See also Marks v. United States*, 430 U.S. 188, 193 (1977)
 22 (holding in fragmented decision is “that position taken by those Members who concurred in the
 23 judgments on the narrowest grounds”) (citation and internal quotation marks omitted). Here,
 24 the rational-basis test is *not* the appropriate standard. A majority of the United States Supreme
 25 Court almost certainly would *not* agree that only rational-basis scrutiny governs decisions by
 26 library administrators to prevent adults from accessing constitutionally-protected speech online.

1 To the contrary, heightened scrutiny (at least at the level specified by Justice Breyer) almost
 2 certainly applies, and the NCRL's filtering policy fails that standard. The "narrowest ground"
 3 on which the plurality and Justices Kennedy and Breyer agreed was that a public library does
 4 not violate the First Amendment by deploying filtering to block "harmful to minors" material
 5 *so long as it completely disables the filter at the request of adults.* *ALA*, 539 U.S. at 214-15
 6 (Kennedy, J., concurring in the judgment), 219-20 (Breyer, J., concurring in the judgment).
 7 Because the NCRL will *not* disable its filter for adults, *ALA* requires this Court to strike down
 8 the NCRL's filtering policy as an unconstitutional content-based restriction on speech.
 9

10 **F. CONCLUSION.**

11 One cannot help but conclude in reading *Bradburn* that the majority was animated in
 12 large part by a belief – unstated in its opinion, but apparent in its focus on pornography – that
 13 much of the speech at issue in this case can be censored because it is of low value. Such a
 14 belief is inappropriate in the context of the First Amendment:

15 The First Amendment's guarantee of free speech does not extend only to
 16 categories of speech that survive an ad hoc balancing of relative social costs and
 17 benefits. The First Amendment itself reflects a judgment by the American
 18 people that the benefits of its restrictions on the Government outweigh the costs.
 19 Our Constitution forecloses any attempt to revise that judgment simply on the
 20 basis that some speech is not worth it.

21 *United States v. Stevens*, No. 08-769, slip op. at 7 (U.S. Apr. 20, 2010). In any event, as
 22 explained at length in Plaintiffs' summary judgment briefs (Docket Nos. 40, 53, 58), this case
 23 is not about pornography, but rather about an overbroad filtering regime that is preventing
 24 adults in five rural Washington counties from viewing non-pornographic, constitutionally-
 25 protected speech on public library computers. As the *Bradburn* dissenters admonished, "the
 26 State has no interest in protecting adults from constitutionally protected materials on the
 27 Internet." *Bradburn*, No. 82200-0, slip op. at 8 (Chambers, J., dissenting). This Court should
 heed that admonition and strike down the NCRL's overbroad content-based filtering policy as
 violative of the First Amendment.

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